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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1006

STATE FARM FIRE AND CASUALTY COMPANY
Petitioner

versus

GENE B. McFERRIN
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MR. FRED H. SIEVERT, JR.
Attorney for Petitioner
Pioneer Building
Lake Charles, Louisiana

P. A. BIENVENU
BIENVENU & CULVER
1414 American Bank Building
New Orleans, Louisiana
Of Counsel for Petitioner

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OPINION BELOW

State Farm Fire and Casualty Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on September 18, 1967.

The only opinion rendered by the Court below is reported in 382 Fed. 2d 282, a copy of which is printed in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1967. Rehearing was denied on the 24th day of November, 1967. An order was granted by the Court of Appeals staying the mandate of the Court for forty-five days in order to permit petitioner to file this petition for certiorari. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 USC 1254 (1).

QUESTIONS PRESENTED

This is a suit to recover under a fire insurance policy for the damages sustained to the insured property for which liability was denied by the insuror, petitioner, on the ground that respondent willfully caused the destruction of the insured property by fire. During the trial of the case the Trial Court refused to permit defendant, petitioner, to cross-examine respondent and to introduce evidence to attack his credibility and to show motive on his part to destroy the insured property. The Court excluded the evidence under Louisiana Revised Statute Title 15, Sections 490 and 491, two articles of the Louisiana Code of Criminal Procedure and the Court of Appeals approved such action. The questions presented are:

1. Whether the Court erred in approving the ruling of the trial court when it refused to permit petitioner to cross-examine respondent and to present to the jury, for the purpose of showing motive and attacking his credibility, evidence to establish that for the years 1958 through 1963 respondent, while in the employ of petitioner, deposited to his personal account in two banks

in Lake Charles, Louisiana, sums totalling $76,524.20, when his income tax returns and testimony reflected that his total earnings during that same period of time were no more than $34,935.72. The admitted evidence reflected that subsequent to the termination of his employment for the period of ten months before the fire, his total income was only $371.29.

2. The Court erred in holding that the trial court's action in excluding such evidence is supported by LSA-R.S. 15, Sections 490-491, two articles of the Code of Criminal Procedure, when under the law of Louisiana such articles are clearly not applicable to civil cases and it is equally well settled under Louisiana law, that in a civil action where the defense of arson is made as here, the rules pertaining to civil and not criminal proceedings are applicable.

3. The Court erred in failing to apply Rule 43 (a) of the Federal Rules of Civil Procedure and admit such evidence.

4. The Court erred in holding that LSA R.S. 15: 490-491 have "analogical value in the circumstances this case presents" because, under the rules governing use of statutes by analogy, R.S. 15:490-491 are not susceptible of extension.

STATUTES INVOLVED

The following statutes and the pertinent provisions involved are Rule 43 (a), Federal Rules of Civil Procedure; Louisiana Revised Statute Title 15, Sections 490-491; Civil Code Articles 20 and 21. These are set out as follows:

Federal Rules of Civil Procedure, 43 (a)

"* * * All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs * * *"

LSA-R.S. 15:490 (Vol. 10-12 La. Revised Statutes, pp. 371, 374)

"The credibility of a witness may be attacked generally, by showing that his general reputation for truth or for moral character is bad, or it may be attacked only insofar as his credibility in the case on trial is concerned."

Section 491:

"When the general credibility is attacked, the inquiry must be limited to general reputation, and cannot go into particular acts, vices or courses of conduct."

L.S.A.—Civil Code Article 20

"The distinction of laws into odious laws and laws entitled to favor, with a view of narrowing or extending their construction, can not be made by those whose duty it is to interpret them."

L.S.A.—Civil Code Article 21

"In all civil matters, where there is no express law, the judge is bound to proceed and decide

according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

STATEMENT OF THE CASE

Respondent filed this removed suit (28 USCA 1332a) to recover the sum of $41,100.00 under a fire insurance policy issued to him by petitioner alleging that his home and contents, covered by the policy, had been totally destroyed by a fire which occurred at midnight on December 7, 1963, while he and his family were away from Lake Charles, where the property was located. The defense was that respondent had destroyed the property by fire for the purpose of collecting the insurance proceeds.

The case was tried to a jury which returned a verdict in favor of respondent.

The evidence established that respondent was in the employ of petitioner as a claim agent stationed in Lake Charles, La., beginning about July, 1957 and his employment terminated in March, 1963. On March 6, 1963, prior to his termination, he purchased the insured house for a total of $22,500.00 paying $5,000.00 down and borrowed the balance of $17,500.00 from the First Federal Savings and Loan Association of Lake Charles, (R. 141-143) At the time of the fire on December 7, 1963 his indebtedness to the association was $17,313.12. (R. 125, Ex. D-59, 60)

Subsequent to the termination of his employment he moved to Shreveport, La., unsuccessfully entered a business venture there and returned to Lake Charles

to live approximately ninety days later. (R. 140-141) After he left Lake Charles he and his wife tried unsuccessfully to sell his house for $25,000.00. (R. 141)

The fire occurred at midnight on December 7, 1963, several hours after he and his family left Lake Charles to visit relatives in Breaux Bridge, La. approximately one hundred miles away. (R. 113)

Petitioner offered competent evidence to establish that the fire was of incendiary origin and that the contents of the building were not consumed by fire as claimed. (R. 294, 295, 305, 568, 572)

The evidence established that respondent was a free-spender, high liver, a gambler and a heavy drinker. (R. 604)

During the period from July, 1957 to March, 1963 respondent worked for no party other than petitioner and had no earnings other than the wages he received from it. (R. 153-157) His income tax return revealed that for the year 1959 his total income was $6,150.53; for the year 1960, $6,027.16; for the year 1961, $6,837.92; for the year 1962, $7,241.32 and for the entire year 1963, three months of which was sepnt in the employ of petitioner, his total earnings were $2,307.40 from petitioner and $371.29 as "business income". (Ex. D-55, 56, 57, 58)

Petitioner sought to establish that based on respondent's income tax returns and his salary for the year 1958 his come should have been a maximum of $6,000.00. Thus his total salary and income for the years 1958 through 1963 should have amounted to $34,935.72 and no more.

Petitioner sought to prove by cross-examination of respondent and otherwise, that during the aforesaid period of time he deposited in two banks in Lake Charles the sum of $76,524.20. The trial Court would not permit petitioner to cross-examine respondent or to introduce other evidence concerning such deposits, which was offered in order to show motive to destroy the property when his source of such high income was removed and to attack his credibility, when his income tax returns were considered.

The trial Judge had advised counsel for petitioner that he would not permit such evidence to be presented to the jury. No questions were propounded to the witness and no offers made on the subject in the presence of the jury. Part of what transpired out of the presence of the jury follows:

"THE COURT:

What's that got to do with him burning down his house, if he burned it down?

"MR. BIENVENU:

Well, that is just to overcome, if the Court please, the idea that he had huge expenses, which may not have been incurred by him, that he was repaid by the company in some way or another, and it has to deal with the — has to deal, if the Court please, with his financial condition, and as we said on yesterday, it looks like a week ago, as we said on yesterday, it is our intent, if the Court please, to lay this foundation and to show that during the time that this man was working for State Farm Insurance Company, he was earning the amounts

which I am going to establish, which run from approximately $5000 to $6000 a year, more or less, during the time that he was in Lake Charles. He also, if the Court please, was running funds, involving many thousands of dollars, through his accounts, depositing as I said on yesterday, for instance, in 1958, $12,180.34; in 1959, $13,185.14; in 1960, $14,146.30.

"THE COURT:

What does that show?

"MR. BIENVENU:

May I —

"THE COURT:

What does that show, Mr. Bienvenu?

"MR. BIENVENU:

If the Court please, we think that this shows that this plaintiff had other sources of income.

"THE COURT:

How does that affect it?

"MR. BIENVENU:

It affects it in this way: He had these sources of income while in the employ of State Form, and we believe, if the Court please, that when he left State Farm, such sources of income were not available to him, and that would constitute a motive to destroy this house because of the fact that he did not have the money with which to pay the mortgage and

with which to live, and with which to support himself and support this family.

"MR. ROACH:

Your Honor, if the Court please —

"THE COURT:

The Court doesn't — I can't go along with Mr. Bienvenu's argument at all. I do not think that such evidence is relevant to this case. Now his income, as to what he had, it seems like to me what you are saying is that you want to show that he had income of $13,000 rather than $6,000, or $12,000 rather than $6,000, in rough figures, and that would, if anything, that would show he had more money, but now you are going to show when he left State Farm that his income was cut, the inference being of course, that he was getting some money on the side for something that he was doing with the State Farm. That's what it seems to me that you are trying to prove, Mr. Bienvenu.

"MR. BIENVENU:

Whatever the inference might be, if the Court please, the facts, we think, remain that this man had a limited income from his employment, and he said his only earned income, and he was depositing large sums of money and we think, if the Court please, that we believe and urge that when he lost his job, the other source funds was cut off and he found himself financially embarrassed.

"We are also going to be able to establish, we think, that this man was a great spender of money and that —

"MR. McFERRIN:

Your Honor, may I —

"THE COURT:

No sir, you may not. Let Mr. Bienvenu have his say.

"MR. BIENVENU:

A great spender of money, a high liver, and that he couldn't live on the money that he was making and much less after he left the employ of the company.

"We believe also, as we stated before, that the income tax return of this man for the years in question, '61, '62, and '63, report only his income from State Farm with the exception of one; at one time, I believe he reported a small amount that he received from some — yes, American Home Assurance Company in 1959 of $576.90, but for the years 1959, 1960, 1961, 1962, we do not have his 1963 return, his income tax return reflected only that limited income.

"We think, if the Court please, that it is proper to show — and for the purpose of showing motive, and further, to test the credibility of this witness — to show that he had all of these funds running through his account, to show that he had a limited account salary with the company, and to show, if the Court please, that he filed income tax returns along the lines that we have set forth, by these —" (R. 159-162.)

* * * * * *

"To give you an idea of the general picture,

the total deposits for '58, '59, '60, '61, '62 and for two months in '63, are $76,524.20. The maximum earnings that this man could have had during that period of time was about 24, maybe $25,000. The income tax returns which he filed with the United States government show such earnings.

"Now we think, if the Court please, that this jury is entitled to know something about this man; his credibility is at stake, He says he left his house and it was in perfect condition, no fires, no this, no that or the other, and that it was destroyed by some unknown cause. We say that this is not true.

"Now counsel says we are putting the cart before the horse. We think that we make our case as we see it and we go along.

"This witness is on the stand and he is subject to cross examination. If in due course the jury considers that what has been established is of no consequence, then, of course, the jury will not take it into consideration.

"THE COURT:

I am not going to let this man be tried today for income tax evasion.

"MR. BIENVENU:

This is not for income tax evasion, if the Court please; we are not doing that.

"What we are trying to do, and I think properly so, with all due deference, if the Court please, is to test the credibility of this man.

"Now, I know that Your Honor, in conference on yesterday, referred to law and cases having to deal with attacking the general reputation of an individual, but that is not the same law as that law which allows the interrogation of a litigant to a lawsuit for the purpose of testing his credibility. We gave to Your Honor on yesterday two cases which we think are directly in point.

"THE COURT:

I don't think so. I just disagree with you. I have got to rule on this matter now, Mr. Bienvenu, and I think I have heard arguments pretty lengthy now, Mr. Bienvenu, on it.

"MR. BIENVENU:

Well, it's a very —

"THE COURT:

You may keep on talking though.

"MR. BIENVENU:

It's a very important matter from our standpoint, if the Court please, and if I were not so deep down sincere in my beliefs about the correctness of our position, I would not burden Your Honor with this lengthy discourse because we went into it yesterday, but there is — and I beg Your Honor to consider this — there is a great deal of difference between the law which Your Honor cited with respect to establishing reputation of an individual, where you can't do it by specifics and you have to do it in a certain particular way, and the law, a separate and distinct — and the law having to deal with

the cross-examination of a witness for the purpose of impeachement.

"Now, this witness has testified, if the Court please, concerning his earnings and his income contrary to the information that I have just given you. He has never come out in discovery depositions an admitted the facts that I have stated to you concerning all of this income." (R. 164-166.)

The offer of proof was then made which in part states:

"It is the contention of defendant here to attack the credibility of this witness; to establish motive; to establish fraud and false swaering, and in so doing, to produce evidence to establish that during the time that he resided in Lake Charles, Louisiana, he was employed by State Farm Mutual Insurance Company, the defendant in this case, and that his earnings during that period of time ranged from five to six thousand dollars a year as a claims adjuster; that he had no other employment from (sic) he received any funds; that he had no other earnings; and that, in fact, he had no other source of income; and that he filed with the United States Government, on forms provided by the government, more commonly identified as Forms 1040-A, income tax returns, for some of the years in question, giving varying income.

"Starting with the year 1959, he reported his income with State Farm as $5,573.63, and with American Home Assurance Company, $576.90, for a total of $6150.53; for the year 1960, he reported an income of $6,027.16 from State Farm, as a total return; for the year 1961, the sum of $7,400 — no excuse me;

strike that, please — the sum of $6,837.92 as income from State Farm, as his total return; in 1962, the sum of $7,241.32, as his income from State Farm Mutual Insurance Company.

"Copies of said returns are made part of this offer of proof, if the Court please, and we think no further identification is necessary unless the Court would require same.

"Further, if the Court please, we have had filed into the record of — scratch that. We have returns on subpoena duces tecums issued to the Lakeside National Bank of Lake Charles, which show that deposits made by plaintiff from the period January 27, 1959, through March 11, 1962, amounted to the sum of $11,372.32, and which we say will also show that all of said funds were removed from the bank from time-to-time, each month; and then the Gulf National Bank of Lake Charles, he had deposits from February 7, 1958, to March 11, 1963, of the sum of $65,142.88, and that said records will also show that said funds were withdrawn from time-to-time by checks, obviously — by checks on said account, so that the total deposits during said years appears to be in the approximate sum of $76,000, as compared to the earnings that plaintiff received from State Farm and reported to the federal government during this time in question.

"We also, if the Court please, want to offer in evidence photostatic copies of — no, I will leave that for the time being.

"It would further be our purpose, if the Court please, by examination along this line to establish that when the discovery deposition of the plaintiff was taken in this case, subsequent

to the filing of the lawsuit, the date being July 21, 1964, the plaintiff was asked questions concerning whether or not he had additional sources of earnings and he stated he did not; and he was asked if he had additional sources of income and he stated that he did receive some income from his father over a period of time, for instance in 1962, he said he received about $3,000 and could not and did not specify what other income he may have received from his father, just making that one statement concerning the amount.

"And, in that connection, if the Court please, we would also offer in evidence the return to the subpoena duces tecum filed herein by the Bank of Coushatta covering the various accounts of Mr. and Mrs. J. B. McFerrin, including the checking account of Mr. and Mrs. J. B. McFerrin, Max Candy Company, Mr. and Mrs. J. R. McFerrin, savings account No. 6511, and J. R. McFerrin's savings account No. 1659, which accounts we show have no funds therein which would in any way justify the conclusion that if said parties were put on the stand, they could testify that they gave any sums approximating the amount of other income which plaintiff had — other funds, let me put it — that the plaintiff ran through his aforesaid bank accounts, which have been referred to before.

"May I have one minute, if the Court please?

"THE COURT:

Certainly.

"MR. BIENVENU:

Mr. Sievert calls my attention the fact that

I may have referred to — with respect to the Lakeside bank — to March, '62. The correct date would be March '63, because that was when the employment by McFerrin with State Farm ceased.

"THE COURT:

Those are actually in the record anyway, aren't they, Mr. Bienvenu, the returns made as a result of these subpoena duces tecums, they are all in the record?

"MR. BIENVENU:

Yes, but the date is needed. In other words the accounts run beyond that time, and it would be necessary to cut the account off as of that date insofar as our position is concerned.

"THE COURT:

Those records are made a part of this offer of proof.

"MR. BIENVENU:

Yes, these records which have been heretofore returned by the subpoena duces tecums are offered in evidence as part of this offer of proof, which we would make if we were permitted to ask the questions to the various witnesses and introduce the various exhibits into evidence before the jury, and we earnestly urge Your Honor to allow us to make such proofs before the jury.

"THE COURT:

The offer of proof is received. The Court does not think that such evidence is admissible on the issues of this case." (R. 168-172.)

On two other occasions during the trial of the case, defendant sought to introduce evidence concerning the other income without success. On one occasion, counsel for plaintiff asked the witness Phillips, under cross-examination and in the presence of the jury if he had attempted to determine the true financial condition of plaintiff by examining bank records. (R. p. 533.) Defendant urged the Court to allow introduction of the excluded evidence in view of the fact that the matter had been opened up and gone into by counsel for plaintiff, but the request was again denied. (R. p. 544.)

After Deputy State Fire Marshal Welborn testified out of the presence of the jury that he had investigated his deposits and his earnings, saying:

> "During the years that I investigated, he had approximately $75,000.00 in deposits against $30,000.00 income.
>
> Q. Did the bank records also show that he had heavy withdrawals from those accounts?
>
> A. They did."

An offer of all of the records covering the accounts in both banks was again made, but rejected by the Court. (R. p. 595.)

It was also established out of the presence of the jury, that contrary to statements which plaintiff had made in his deposition, his father was in no position to give him any such sums of money as were found in deposits in the banks for the years mentioned. (R. p. 599.)

The Court of Appeals in concluding that the trial

Court was correct in excluding the evidence, in footnote No. 1, on page 2 of the opinion said:

> "The Trial Court's actions appear entirely consistent with the evidentiary principles governing this issue set out in LSA-R. S. §§15:490-91. See also 3 McCormick, Evidence §§ 983, 944, 1005 (1940). Although we recognize that the cited Louisiana statutory provisions represent *criminal* rules of evidence, we consider that such rules have an analogical value in the circumstances this case presents."

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because:

A

The Court below erroneously excluded evidence in a civil case by the use of statutes governing criminal cases. which is prohibited by the decisions of the Louisiana Courts. LSA-R. S. 15:490 491; *Moosa v. Abdalla* 248. La. 344, 178 So.2d 273 (Supreme Court of Louisiana. July, 1965); *Boulware v. Boulware*, 153 So.2d 182 (Court of Appeal of Louisiana April, 1963); *Rhodes v. Metropolitan Life Insurance Co.*, 5th Cir. 172 Fed. 2d 183, Certiorari denied, 337 U.S. 936, 69 S.Ct. 1495, 93 L. Ed. 1738; *Parker v. Hartford Fire Insurance Co.*, 163 So. 435 (Court of Appeal of La. October, 1935) *Hoffman v. Western Marine & Fire Insurance Co.*, 1 La. Ann. 216 (Supreme Court of La., 1846); *Sumrall v. Providence Washington Insurance Co.*, 221 La. 633, 60 So.2d 68 (Supreme Court of Louisiana).

R.S. 15:490 and 491, cited hereinabove, apply only

to criminal proceedings having been reenacted by the Revised Statutes of 1950 from the Code of Criminal Procedure 1928.

In *Moosa v. Abdalla*, 248 La. 344, 178 So.2d 273, the Supreme Court of Louisiana in discussing whether or not an article of the same code, contained in the same Revised Statutes could be applied so as to create a physician-patient privilege in a civil action said:

> "The Legislature defined the physician-patient privilege in Article 476 of the Code of Criminal Procedure of 1928. That Code was re-enacted as part of the Louisiana Revised Statutes of 1950, appearing in Chapter 1 of Title 15. The codal articles retained their identity. LSA-R. S. 15:01 Article 476, upon which the Defendant in Rule relies, may now be cited as R. S. 15:476. The Article, however, applies only to criminal proceedings. *Boulware v. Boulware supra; Rhodes v. Metropolitan Life Ins. Co.*, 5 Cir., 172 F.2d 183, certiorari denied 337 U. S. 930, 69 S.Ct. 1495, 93 L.Ed. 1738.
>
> "The Defendant in Rule, it is true, contends that this child-custody proceedings is quasi-criminal, justifying an extension to it of LSA-R. S. 15:476. We, however, find this argument to be unfounded. An action for separation or divorce is civil in nature. See LSA-C.C.P. Arts. 3941-3945. The fixing of the custody of the children born of the marriage is incident to the matrimonial action. LSA C.C. Arts. 146, 151, 157. Alhtough the state has an interest in protecting the welfare of the children, such interest does not make this child-custody proceeding a criminal matter. Thus, we cannot extend the provisions of LSA-R. S. 15:476 to this proceeding."

It is equally well settled in Louisiana that where the defense of arson is made to a suit under a fire insurance policy, rules pertaining to civil and not to criminal proceedings are applicable. In *Parker v. Hartford Fire Insurance Co.*, 163 So. 435 the Court said:

> "The principles of law applicable to this case are firmly established in the jurisprudence of this state. In the first place, a distinction is made between the character of proof necessary to sustain a criminal charge of arson and that requisite to maintain a defense in a civil suit on a policy of fire insurance. Under the well recognized rule of criminal law, the crime of arson must be proven beyond a reasonable doubt. If there is a reasonable doubt, there must be an acquittal. In a suit on a policy of fire insurance, the burden of proof rests upon the insurer to establish the facts upon which it has based its defense and seeks a release from its contractual obligation, and, as in all other civil actions, issues of fact are determined by a preponderance of evidence. Thus, the rigorous rule of the criminal law, being relaxed in a civil suit, it is conceivable that under the identical set of facts an acquittal might be obtained of the charge of arson in a criminal suit and a good defense maintained in a civil suit on the policy contract. Furthermore in cases of this character, every kind of evidence, circumstantial or presumptive, which tends to convince the mind may be adduced by either side. The reason for this rule is based upon the fact that the setting or causing to be set of the fire is always attended by the utmost secrecy. There are no eyewitnesses, and the illegal act is seldom exposed to the light of day."

The Supreme Court of Louisiana and the various

Courts of Appeal have thus clearly stated that the criminal rules of evidence or procedure are not to be considered in a civil case involving arson. Accordingly, the conclusion of the Court of Appeals that LSA-R. S. 15:490-491 "have an analogical value" to justify the exclusion of the evidence offered in this case is clearly erroneous.

Further F.R.C.P. 43 (a) in emphatic language says: "In any case, the statute or rule which favors the reception of the evidence governs", and it was error to exclude rather than admit the evidence.

B

Evidence of the financial condition of respondent to show motive and to test his credibility was an important element of proof in this civil case where the defense is arson. *Sumrall v. Providence Washington Insurance Co.*, 221 La. 633, 60 So.2d 68;

The motive of respondent and his credibility were two very important factors in this case.

Evidence which established that during the period of his employment by petitioner in Lake Charles, La., respondent earned $34,935.72 and deposited in his account during that same period of time $76,524.20 is relevant on the question of motive, when considered with the fact that for 10 months after he left the employ of defendant in the year 1963 his total income was $371.21. It is also relevant when considered with the fact that the proof establish that even though he had such a meager income he continued to have all of his ordinary living expenses including the obligation under

the mortgage note covering his home which totalled $17,500.00 and which required payemnts of $118.00 each month.

Proof that respondent during the time of his employment with petitioner deposited to his account each year sums greatly in excess of his earnings and reported only his earnings to the internal revenue department is evidence which attacks his credibility.

In *Sumrall v. Providence Washington Insurance Co.*, 221 La. 633, 60 So.2d 68, the Supreme Court of Louisiana in discussing the defense of arson in a civil case said:

> "Inasmuch as the defense is arson, the burden rested upon the insurer to establish, by convincing proof, that the fire was of incendiary origin and that plaintiff was responsible for it. It is well settled that the isurer need not prove its case against a plaintiff beyond a reasonable doubt; it suffices that the evidence preponderates in favor of the defense. Proof, of course, may be and invariably is entirely circumstantial, and, in these instances, a finding for defendant is warranted where the evidence is of such import that it will sustan no other reasonable hypothesis but that the claimant is responsible for the fire. *Adams v. Liverpool & London & Globe Inc. Co.*, 5 Orleans App. *St. Philip v. Lumbermen's Ins. Co. of Philadelphia*, 18 La. App. 331, 137 So. 359; *Wilson v. Aetna Ins. Co.*, La. App. 161 So. 650; *Parker v. Hartford Fire Ins. Co. of Hartford Conn.*, La. App., 163 So. 435; *Pecoraro v. Insurance Co.*, 175 La. 416, 143 So. 360; *DiMartino and Pizzolato v. Liverpool & London & Globe Ins. Co.*, 207 La. 101, 20 So.2d 551. * * *

* * * * * *

> "Considering that plaintiff was in dire financial circumstances and that he alone, according to the evidence, would benefit by the fire, there can be no doubt that defendant has established that he had a *motive* for destroying the property. And motive, plus the incendiary origin of the fire, would, in the absence of *believable* rebuttal evidence, be sufficient to sustain the affirmative defense pleaded by the insurer. See *Pecoraro v. Insurance Co.* and other authorities cited above. However, the inference resulting from this circumstantial proof must be weighed in connection with plaintiff's denials of wrongdoing."

In one paragraph the Louisiana Supreme Court emphasized the importance of two factors, motive and credibility, which are two of the paramount factors involved in a case where the defense of arson is made. All evidence "which tends to convince the mind may be adduced by either side", in establishing both motive in the plaintiff and lack of credibility on the part of plaintiff.

C

Cross-examination of respondent on his financial condition, his source of income which was far in excess of his tax returns prior to the fire and his lack of income after the fire, was material in testing his credibility and should have been permitted. *Sumrall v. Providence Washington Insurance Co.*, 221 La. 633, 60 So.2d 68; *Carpenter v. Union Insurance Co.*, 284 Fed. 2d 155; *U. S. v. Pagano*, 224 Fed. 2d 682; *U. S. v. Lowe*, 234 Fed. 2d 919; *Segal v. U. S.*, 246 Fed. 2d 814; *U. S. v.*

Jackskion, 102 Fed. 2d 683; *U. S. v. Lawinski*, 195 Fed. 2d 1.

There are many decisions in the Federal Courts which have permitted the introduction of evidence either by cross-examination of the party or otherwise, to establish other income or funds belonging to the litigant, so as to attack his credibility.

In *Carpenter v. Union Insurance Co.*, 284 Fed 2d 155, the Court allowed evidence as to the financial condition of the corporation and its owner to show motive on the part of the owner who destroyed the property.

In *U. S. v. Pagano*, 224 Fed. 2d 682, the defendant was charged with bribery of an internal revenue agent. He testified that he was a working man of extremely modest means with a total earning of $411.50. The Court permitted the prosecutor to bring out under cross-examination that he had taken a trip to Europe in 1951, which certainly indicated that he was not telling the truth about his income. The testimony was allowed to attack his credibility as a witness.

In *U. S. v. Lowe*, 234 Fed. 2d 919, a defendant was charged with extortion. The prosecutor was allowed to cross-examine him about his source of income and his testimony that he was a man of minimum income. The testimony was elicited under cross examination and in this connection, the Court said:

> "The second reason why there was no error in the exploration of this subject is that it was cross-examination. When a defendant takes the stand in a criminal case he is subject to cross-examination as any other witness is. No auth-

ority needs to be cited for the proposition that one of the purposes of cross-examination is to test the credibility of the witness and, subject to the judge's control, that cross-examination may go rather far. The scope of direct examination poses no limitation in this respect. Here the cross-examination was very material in testing the credibility of the defendant. See *United States v. Pagano*, 2 Cir., 1955, 224 F.2d 682, 685, certiorari denied 350 U.S. 884, 76 S. Ct. 137."

In *Segal v. U. S.*, 246 Fed. 2d 814, the Court approved the cross-examination of the defendant charged with subornation of perjury. He was cross-examined with reference to his income tax returns to which he objected. The Court said:

"Defendant, having taken the witness stand in his own behalf, was subject to cross-examination to the same extent as any other witness. That cross-examination might go to any fact in issue or to the impeachment of his credibility."

In *U. S. v. Jackskion*, 102 Fed. 2d 683, the defendant was charged with possession of two unregistered stills and for carrying on a distillery business without bond. His bank balance was introduced in evidence to show that he had $8,000.00 in the bank when his normal balance was only $1,000.00. He objected to such evidence and the Court said:

"It is the general view that where a defendant is on trial for a crime in which pecuniary gain is the usual motive, evidence of the sudden acquisition of money by the defendant is admissible, even though the source of the money is not traced."

In *U. S. v. Lawinski*, 195 Fed. 2d 1, the defendant was charged with unlawful transportation of stolen automobiles. In the course of the decision, the Court stated:

> "However, a well known exception to the rule is recognized, and that is that collateral matters may be gone into on cross-examination to a limited extent for the purpose of testing the witness' credibility. Thus inquiries may properly be directed to the witness' interest, his motives, his prejudices or hostilities, his means for obtaining knowledge of the fact, his power of memory, his way of life, his associations and to any pertinent circumstances affecting his credibility."

The foregoing decisions fully support the position of petitioner, that the evidence sought to be introduced under cross-examinaiton of respondent and otherwise should have been received and presented to the jury.

D

LSA-R. S. 15:490-491 have no analogical value in a civil case. The analogical use of said statutes to exclude evidence is clearly erroneous.

The Court of Appeals attempted to justify its use of R.S. 15:490-491 by invoking the Civil Law concept of "Interpretation by Analogy." In view of the Louisiana decisions, there is no room for application of "Analogy."

Article 21 of the Louisiana Civil Code (quoted below) authorizes and governs the use in Louisiana of "Interpretation by Analogy." Franklin, Equity in Louisiana, Article 21, 9 Tul. L. Rev. 498 (1935), Morrow, Louisiana Blueprint, 17 Tul. L. Rev. at 390 (1943).

> L.S.A.-C.C. Art. 21. "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

Analogy may only be used "where there is no express law" and where "the positive law is silent." F.R.C.P. 43(a) and the previously cited Federal and Louisiana cases demonstrate the existence of express law sanctioning the admissibility of evidence of financial condition. Therefore, the use of R.S. 15:490-491 by analogy was improper and the trial judge erroneously excluded the evidence offered by petitioners. (See *Williams v. Alphonse Mortgage Co.*, 144 So. 2d 600 at p. 602 (La. App. 4th Cir.)

Assuming arguendo that the aforecited law is not fully determinative of the issue of admissibility, it is respectfully submitted that the analogical use of R.S. 15:490-491 to exclude the proferred evidence was improper and was an incorrect use of the concept of analogy.

By decisions analogically correlated to existing law, Civil Law Jurisdictions attempt to have the interpretation of their statutory enactments form an organic whole which supplements and renews itself through applications of principles drawn from the interior purposes and consequences of such existing law.

Analogy leads to the solution of a given factual situation by a solution induced from a fundamental similarity between that factual situation and one governed by or foreseen by the existing statutory enact-

ments. (See Geny, *Method of Interpretation and Sources of Private Positive Law*, 2d Edition, 1919, translation by the Louisiana State Law Institute, 1963, No. 106-107 at p. 209).

Analogy operates either on the basis of specific and precise texts with the view to discover in them the nucleus of broader decisions, (in German terminology *Gesetzanalogie)*, or by searching in a broader perspective for the latent rules which underlie the whole legal system (*Rechtsanalogie*) Geny, No. 166 p. 384.

The Court of Appeals, by finding that R.S. 15:490-491 had "analogical value in the circumstances this case presents", applied the technique of "analogy of the statute" (*Gesetzanalogie*) in an attempt to draw from said statutes a principle justifying the exclusion of evidence of plaintiff's financial condition.

The analogical use of these statutes was error for the following reasons:

1. Penal law may not be extended analogically to the area governed by private law.

2. R.S. 15:490-491 constitute an application of the law of evidence based on a particular situation foreseen by the legislator and establish an exceptional rule.

3. The rule of evidence set forth in R.S. 15:490-491 is a restrictive one, one in derogation of the liberal principles of admissibility of the Louisiana and Federal Civil Rules of evidence.

1. A Criminal procedure text is not susceptible of supplementation by analogical application to a factual situation governed by civil rules.

The Louisiana Legislature and Courts have uniformly characterized R.S. 15:490-491 as applicable solely to criminal cases. In using these statutes to exclude evidence in a civil suit, the Trial Judge and the Court of Appeals have erroneously attempted to reverse the legislative intent and judicial interpretation of this characterization.

These statutes were originally Articles 490-491 of the Louisiana Code of Criminal Procedure of 1928. In 1950, with the revision of the Louisiana Statutes, they were incorporated in Title 15 as Sections 490-491. Title 15 is devoted exclusively to matters pertaining to Criminal Procedure.

As recently as 1966, the Louisiana Legislature, in adopting a new Code of Criminal Procedure, reaffirmed this characterization. Title 15 was reenacted in its present form and the section of the former code on Criminal evidence was replaced in it, pending the enactment of a new Code of Evidence.

Article 3 of the Louisiana Criminal Code (L.S.A.-R.S. 14:3) expressly disallows the use of its provisions by analogy.

> "Articles of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction according to the fair import of their word,

> taken in their usual sense, in connection with the contents, and with reference to the purpose of the provision."

The Reporter's Comments explain this article as follows:

> "A distinction between civil and criminal statutes with reference to interpretation is preserved. Article 3 expressly states that the analogical projection usually permitted in handling civil statutes is not available in interpreting this Code."

This follows the traditional Civil Law treatment of Criminal statutes, as expressed by Domat (The Civil Law in Its Natural Order by Jean Domat, Strahan's translation, Cushing's Edition, 1861, Vol. 1, p. 127).

> "54. Laws which are restrained. — The laws which restrain our natural liberty, such as those that forbid anything that is not in itself unlawful or which derogate in any other manner from the general law; the laws which inflict punishments for crimes and offenses, or penalties in civil matters; those which prescribe certain formalities; the laws which appear to have any hardship in them; those which permit disinheriting, and others the like, are to be interpreted in such a manner as not to be applied, beyond what is clearly expressed in the law, to any consequences to which the laws do not extend. And, on the contrary, we ought to give to such laws all the temperament of equity and humanity that they are capable of.

and by Baudry-Lacantinerie:

> C'est principalement à aide de l'esprit de la

> loi qu'on peut en fixer la portée: la loi, sauf en matiére pénale, doit etre appliquée à tous les cas qui, quoique non compris dans son texte, doivent être régis par lui d'après son esprit (Baudry-Lacantinerie et Houques-Fourcade, *Traité de Droit Civil*, 2d Ed. 1902, Vol. 1, No. 264 p. 205)
>
> "It is principally with the aid of the spirit of the statute that one can determine the range of its applicability: The statute, except in penal matters, can be applied to every case which, although not included in its letter (text), ought to be governed by its spirit." (Translation ours).

Article 21 confines itself by the introductory phrase "In civil matters . . .", and therefore restricts the use of analogy to civil statutes. (Franklin, Equity in Louisiana, supra p. 504).

The Trial Judge and the Court of Appeals have therefore violated the mandate of Article 20 of the Louisiana Civil Code by attempting to override the legislative designation in order to extend the constructon of R.S. 15:490-491 to exclude the evidence in the instant case.

> L.S.A.-C.C. Art. 20. "The distinction of laws into odious laws and laws entitled to favor, with a view of narrowing or extending their construction, can not be made by those whose duty it is to interpret them."

2. The rules pertaining to cross-examination and impeachment of witnesses established by R.S. 15:490-491 are based on considerations peculiar to the Criminal Law. As exceptional provisions, they should not be extended past their express field of application.

R.S. 15:490-491 constitute an exceptional application of the law of evidence. The Roman jurironsult Paul defines such a law as follows:

> "A special law *(singulare jus)* is one which was introduced by the authority of those establishing it for some useful end contrary to the course of reason" (quoted in Franklin, Equity in Louisiana, 9 Tul. L. Rev. at p. 501).

Planiol *(Elementary Treatise of the Civil Law*, translated by the Louisiana State Law Institute, 1959. Vol. 1, No. 222 p. 160) discusses the effect of such a designation:

> "When the law is silent a decision is usually reached by two kinds of arguments based on a comparison of texts. The principal ones are arguments a fortiori and a pari: *'Ubi eadem est ratio, eadem lex esse debet.'* The argument based upon analogy nevertheless loses its force when the provision from which it is drawn marks an exception. Exceptional provisions, as will be seen (No. 223), are not susceptible of extension."

Domat say of the interpretation of a *jus singulare:*

> 55. Laws which are not to be extended beyond what their Words expressly mention. — If any law or custom happens to be established upon particular considerations, contrary to other rules, or to the general law, it ought not to be drawn to any consequence beyond the cases which the words of the law mark expressly.

According to Aubry and Rau:

> Si la disposition est exceptionnelle de sa na-

ture, elle doit être restreinte au cas pour lequel elle est établie. *Exceptio firmat regulam in casibus non exceptis. Exceptio est strictissimae interpretationis.* Ainsi, les dispositions pénales, qui sont toujours à considérer comme des exceptions, ne peuvent jamais être étendues à des hypothéses qu'elles n'ont pas formellement prévues. (Aubry et Rau, *Cours de Droit Civil Francais*, 5th Ed. 1897, Vol. 1, No. 40 p. 196)

"If the provision is exceptional in nature, it must be restricted to the case for which it was established. *Exceptio firmat regulam in casibus non exceptis.* (The exception strengthens the rule in cases not excepted) *Exceptio est strictissimae interpretationis.* (An exception is strictly interpreted). Thus, penal provisions, which are always considered as exceptional, can never be extended to those hypotheses which they have not expressly foreseen." (Translation ours)

Article 7 of Title V of the Preliminary Book of the French Civil Code (Projet of the Year VIII) renders these maxims thusly:

"les exceptions qui ne sont point dans la loi ne doivent point être supplées." (Baudry-Lacantinerie, supra at p. 206).

"Exceptions which are not contained in the statute must never be supplied." (Translation ours)

See also, Franklin, The Ninth Amendment, 40 Tul. L. Rev. 486 at pp. 520-521 (1966).

3. The rule of evidence established by R.S. 15:490-491 is a restrictive one, one in derogation of the liberal

principles governing admissibility under the Louisiana and Federal Civil Rules of Evidence.

As will be discussed in detail below, the general principles controlling the admissibility of evidence are stated by Federal Civil Procedure Rule 43(a) and by Louisiana cases such as *Moosa v. Abdalla.* All of these favor the admission of evidence and exhort the Trial Judge to admit evidence whenever possible.

The objection that might be made to the above argument is that the statutes do not limit themselves merely to Criminal Evidence. Baudry-Lacantinerie, in considering this argument, states:

> En sens inverse, la loi ne s'applique pas aux situations qui, quoique comprises dans son texte, sont exclues par son esprit de sa disposition. *Cessante ratione legis, cessat ejus dispositio.* Tel est le principe de l'interprétation restrictive. Il est vrai que, en vertu d'une autre règle, il n'est pas permis de distinguer lorsque la loi ne distingue pas elle-même: *ubi lex non distinguit, nec nos distinguere debemus.* Mais cetter règle, qui, en défendant de restreindre l'application d'un texte concu en termes généraux, est uniquement fondée sur le respect de la volonté de ses auteurs, ne saurait certes faire obstacle à ce qu'il soit interprété restrictivement, lorsque telle est justement, par hypothèse, l'intention du législateur. (Baudry-Lacantinerie, supra at p. 206)

> "By a reversal of such reasoning, the statute is not applicable to situations which, although included within its letter, are excluded by its spirit. *Cessante ratione legis, cessat ejus dispositio.* (When the reason for a law ceases, so should its application) Such is the principle

> of restrictive interpretation. It is true that by virtue of another rule, it is improper to make a distinction when the statute does not itself make a distinction: *ubi lex non distinguit, nec nos distinguere debemus* (where the law does not make a distinction, neither should we make a distinction). But this rule, which in forbidding the restrictive application of a text drawn in general terms is singularly founded on respect for the will of its drafters, could not be an obstacle to such a text's being interpreted restrictively, when such is exactly, by hypothesis, the intention of the Legislator." (Translation ours)

The clear terms of R.S. 15:490-491 reveal the exceptional and particular nature of the rule established thereby. By the spirit of its legislative intendment, R.S. 15:490-491 must be applied restrictively and only to the area of criminal law.

If resort to analogical concepts is necessary in this case, "Analogy from the General Principles of the Law" *(Rechtsanalogie)* should have been used to project admissibility from such cases as *Moosa v. Abdalla* and *Sumrall v. Providence Washington Ins. Co.* or from F.R.C.P. 43(a).

Ripert and Boulanger, *Traité Elémentaire de Marcel Planiol* (1948 Edition) Vol. 1, No.160 p. 69, discusses the concept of general principles of law as follows:

> "Les principes du droit. — Les diverses règles juridiques peuvent être rattachées à quelques grands principes dont elles constituent les applications, ou au contraire certaines sont des exceptions aux principes généraux, Le législateur

ne formule pas en général ces principes; parce que le commandement législatif doit avoir un caractére plus grand de précision; mais on peut dégager les principes de l'ensemble des règles précises que la loi donne (Geny, *Méthode d' interprétation*, t. I, n° 21). La connoissance des principes n'est pas seulement utile pour comprendre le sens de la règle, elle sert à *determiner le caractere de generalite de la regle.* Si la règle est contraire aux principes, elle doit être interprétée restrictivement.

D'autre part, si le législateur n'a pas appliqué dans certains cas particuliers un principe juridique mais en a reconnu l'existence par d'autres applications, il est permis de retenir ce principe comme imposant une solution."

"The Principles of the Law. The diversity of legal rules can be related to the general principles of which they constitute either applications or, on the contrary, exceptions to such general principles. The Legislator does not formulate these general principles in a general manner, because the legislative directive must have a more precise character; but one can draw principles from the ensemble of precise rules that the law gives. (Geny, *Methods of Interpretation*, Title 1, No. 21) The knowledge of such principles is not useful solely to understand the sense of the rule, it serves to ascertain *the character of generality of the rule.* If the rule is contrary to such general principles, it must be interpreted restrictively.

Similarly, if the legislator has not, in a certain case, applied a juridical principle, but has recognized its existence by other applications, it is proper to consider this principle as imposing a solution." (Translation ours).

The thoroughgoing cast of 43(a) toward admissibility of evidence is demonstrated by the liberality of the judicial interpretation of this rule in similar situations, *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961), *Hambrice v. F. W. Woolworth*, 290 F.2d 557 (5th Cir. 1961), *Young v. United States*, 327 F.2d 933 (5th Cir. 1964). These cases reiterate the legislative and judicial intent that evidence such as that offered by petitioner should be admitted.

In *Dallas County v. Commercial Union, supra*, Judge Wisdom, writing for the Fifth Circuit, was faced with the problem of the admissibility of evidence for which there was no precedent or recognized category. In allowing such evidence to be admitted, he weighed the standards of relevancy and materiality set forth by 43(a). He took account of the liberality of the drafter's intendment toward admissibility. On these criteria, he allowed the defense's evidence to be admitted.

Under this properly applied analogical reasoning, the evidence of plaintiff's financial condition should have been admitted into evidence in the present case, its exclusion was error.

CONCLUSION

For the reason set forth above, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

FRED H. SIEVERT, JR.
Attorney for Petitioner
Pioneer Building
Lake Charles, Louisiana

P. A. BIENVENU
BIENVENU & CULVER
1414 American Bank Building
New Orleans, Louisiana
Of Counsel for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23819

STATE FARM FIRE AND CASUALTY COMPANY
Appellant-Appellee,

versus

GENE B. McFERRIN,
Appellee-Appellant.
(AND REVERSE TITLE)

Appeals from the United States District Court for the Western District of Louisiana.

(September 18, 1967.)

Before WISDOM and GODBOLD, Circuit Judges, and McRAE, District Judge.

PER CURIAM: The plaintiff, Gene McFerrin, sued State Farm Fire & Casualty Co. to recover for the total destruction of his residence by fire. The jury returned a verdict for the plaintiff, awarding $35,875.00 for the dwelling, contents, and living expenses.

The jury further concluded that the insurer's failure to pay was arbitrary. The trial judge fixed at-

torney's fees at $6,000.00 and imposed a penalty of 12 per cent on the amount McFerrin recovered. See LSA 22:658.

The penalty was based on $35,875 les $17,313.12 McFerrin had paid previously under the mortgage clause of the policy. The three issues raised on this appeal concern (1) exclusion of certain evidence tendered by State Farm at the trial, (2) computation of attorney's fees, and (3) deduction of the amount paid to the mortgagee before calculation of the penalty.

(1) State Farm contends that the Trial Court erred in refusing to admit evidence of McFerrin's income tax returns and bank deposits for some five years preceding the fire. This evidence was intended to impeach his credibility and establish a motive for his setting the fire. We conclude that the Trial Court did not abuse its discretionary power to control the breadth and scope of cross-examination and introduction of evidence. *Jones & Laughlin Steel Corp. v. Matherne*, 5 Cir. 1965, 348 F. 2d 394; *Burns v. Travelers Insurance Co.*, 5 Cir. 1965, 344 F. 2d 70.[1]

(2) As to attorney's fees, State Farm contends that they are excessive, McFerrin says they are inadequate. In setting the figure the trial judge considered the amount involved in the controversy, the complexity of the issues, and the length of the trial. This determination is within the trial judge's discretion, so long as the fees set are reasonable. *Sensat v.*

[1]The Trial Court's actions appear entirely consistent with the evidentiary principles governing this issue set out in LSA-R.S. §§ 15:490-91. See also 3 McCormick, Evidence §§ 983, 944, 1005 (1940). Although we recognize that the cited Louisiana statutory provisions represent *criminal* rules of evidence, we consider that such rules have ananalogical value in the circumstances this case presents.

State Farm Fire & Cas. Co., La. App. 1965, 176 So. 2d 804, 808; *Steadman v. Pearl Assurance Co.*, La. App. 1964, 167 So. 2d 527, 531. We find that the fee set by the trial judge was reasonable.

(3) We find further that the Trial Court, before computing the 12% penalty, correctly deducted from the amount due under the policy the amount previously paid to the mortgagee.[2] The Trial Court's dismissal of State Farm's counter-claim, based on an assignment of the mortgage to it, effectively relieved McFerrin of his liability on the mortgage and thereby correspondingly reduced "the total amount of the loss" *to him* because of the fire, or in the alternative, constituted "partial payment" to him.

The judgment of the District Court in all respects is AFFIRMED.

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[2]"Failure to make such payment . . . when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty . . . of 12% damages *on the total amount of the loss, payable to the insured* . . . or in the event a *partial payment* or tender has been made, 12% of the *difference between the amount paid . . . and the amount found to be due* . . . ." LSA 22:658. (Emphasis added)

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1966

No. 23819

D. C. Docket No. CA 10287
STATE FARM FIRE AND CASUALTY COMPANY
Appellant-Appellee,

versus

GENE B. McFERRIN,
Appellee-Appellant.
(AND REVERSE TITLE)

Appeals from the United States District Court for the Western District of Louisiana.

Before WISDOM and GODBOLD, Circuit Judges, and McRAE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant-appellee, State Farm Fire and Casualty Comany, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 18, 1967

Issued as Mandate:

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23819

STATE FARM FIRE AND CASUALTY COMPANY
Appellant-Appellee,

versus

GENE B. McFERRIN,
Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Western District of Louisiana.

(November 24, 1967)

ON PETITION FOR REHEARING

Before WISDOM and GODBOLD, Circuit Judges, and McRAE, District Judge

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause is hereby DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23819

STATE FARM FIRE AND CASUALTY COMPANY
Appellant-Appellee,

versus

GENE B. McFERRIN,
Appellee-Appellant.

(AND REVERSE TITLE)

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein,, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 45 days; th stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 45 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 45

days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 4th day of December, 1967.

/s/ John Minor Wisdom

UNITED STATES CIRCUIT JUDGE

(ORIGINAL FILED — DECEMBER 4, 1967)